Supreme Court, U.S.
FILED
97-1563 DEC 15 1997
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CARL R. LUEM,
Petitioner,

vs.

PATRICIA A. BILLETTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court deny due process to Petitioner by denying him the right to substitute in legal counsel at his own expense before commencement of a civil trial?
2. Did the Ninth Circuit Court of Appeals decide an important federal question in way that conflicts with relevant decisions of this Court?

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I. Petitioner contends that he had an absolute right to retain private counsel at his own expense, as long as the trial was not delayed. This was a constitutional right guaranteed him under the due process clause of the Fifth Amendment, and he was effectively denied a hearing when the District Court denied the Motion to Substitute in an attorney. 6

II. Once the Petitioner's request for a continuance was withdrawn by Petitioner's chosen counsel, the District Court had no discretion to deny the Motion to Substitute Attorney under either the Local Rules or the Fifth Amendment. 6

III. The Ninth Circuit Court of Appeals upheld the District Court's denial of Petitioner's Fifth Amendment rights, in contravention of the Supreme Court's prior holding in *Powell vs. State of Alabama*. 6

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. Memorandum of Decision on Appeal to Ninth Circuit Court of Appeals, case nos. 96-55597, 96-55601, as filed on August 7, 1997, [Appendix A Herein].

2. Findings of Fact and Conclusions of Law After Court Trial as filed on April 3, 1996, in the United States District Court, Central District of California, Southern Division, in case no. SA CV 92-221-AHS (EEX) [Appendix B Herein].

3. Judgment filed on April 3, 1996, in the United States District Court, Central District of California, Southern Division, in case no. SA CV 92-221-AHS (EEX) [Appendix C Herein].

4. Findings of Fact and Conclusions of Law After Court Trial as filed on April 3, 1996, United States District Court, Central District of California, Southern Division, in case no. SA CV 93-354-AHS (EEX) [Appendix D Herein].

5. Judgment filed on April 3, 1996, in the United States District Court, Central District of California, Southern Division, in case no. SA CV 93-354-AHS (EEX) [Appendix E Herein].

6. Order Denying Petition for Rehearing, as filed on October 22, 1997, [Appendix F Herein].

7. Order Consolidating cases, in the Ninth Circuit Court of Appeals, filed on June 3, 1996 [Appendix G Herein].

JURISDICTION

The judgment on appeal that is sought to be reviewed in this Petition for Writ of Certiorari is the memorandum of decision on appeal to the Ninth Circuit Court of Appeals as filed on August 7, 1997, in Case Nos. 91-55597, 96-55601.

A Petition for Rehearing was then filed, and an order denying the Petition for Rehearing was filed on October 22, 1997, in Case Nos. 91-55597, 96-55601.

The statutory provision believed by Petitioner to confer on this Court the jurisdiction to review on a writ of certiorari the judgment in question is the Fifth Amendment to the Constitution of the United States of America, and specifically the due process clause contained therein.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V:

> "No person shall be . . . deprived of . . . property, without due process of law. . ."

> "If in any case, civil or criminal, a state or federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial

> of a hearing, and, therefore, of due process in the constitutional sense."

Powell vs. State of Alabama (1932) 287 U.S. 45, 53 S. Ct. 55, 64, 77 L.Ed. 158; accord, *Roberts vs. Anderson* (10th Cir. 1933) 66 F.2d 874; *Rex Investigative and Patrol Agency, Inc. vs. Collura* (E.D.N.Y. 1971) 329 F. Supp. 696, 699; *R.B. Potashnick vs. Port City Contr. Co.* (5 Cir. 1980) 609 F.2d 1101.

STATEMENT OF THE CASE

The Respondent, PATRICIA BILLETTER, retained the Petitioner, CARL R. LUEM, a licensed obstetrician gynecologist, to perform cosmetic surgery on both of her breasts in October of 1989. The Respondent was concerned over an asymmetry in her breasts. Petitioner then performed a breast augmentation to the left breast and a breast reduction to the right breast.

Infection and necrosis of the breast tissue occurred post-operatively, and defendant performed a subsequent surgery to each breast on two occasions thereafter.

Respondent complained of scarring and disfigurement afterwards, and initiated a State Court action in California, in Orange County Superior Court, on January 23, 1991, for medical malpractice against the Petitioner.

Petitioner thereafter filed a Chapter 7 Bankruptcy, and Respondent had her State Court action removed to Bankruptcy Court, and also filed a separate action in Bankruptcy Court alleged her cause of action to be non-dischargeable under 11 U.S.C. § 523(a)(6).

The Bankruptcy Court then transferred both actions to the U.S. District Court, per the authority of 28 U.S.C.

§157(b)(5). The case was assigned to U.S. District Judge Alicemarie H. Stotler on July 27, 1993.

The Petitioner then substituted himself in pro se on U.S. District Court Case No. 93-354 on August 22, 1995, and on U.S. District Court Case No. 92-221 on or about October 24, 1995. Trial was set for November 7, 1995.

On November 6, 1995, Petitioner lodged a substitution of attorney to substitute in Lawrence A. Strid of Burge, Strid and Dickinson as his counsel in both actions, along with an Ex Parte Application to allow substitution of attorney and to continue the trial.

At the hearing of Petitioner's Motion for a Continuance and to substitute attorneys, as heard the morning of the trial on November 7, 1995, Petitioner's chosen counsel explained to the Court that the Petitioner, a Georgia state resident, was performing surgery that morning in Georgia, but that he was prepared to fly over and be in Court.

The Court denied the Motion to Substitute Attorneys, even after Dr. Luem's counsel represented that he had the authority to rescind the request for a continuance and to proceed immediately with trial as Dr. Luem's attorney.

Notwithstanding this offer, the court still refused to allow the substitution and ordered trial to commence forthwith. Without having his chosen counsel allowed to enter into the trial, and without himself being present, the effect of this ruling was to allow the Respondent to present, in effect, a default prove-up, even though no default was ordered by the Court.

Trial was concluded on both cases on November 7, 1995.

Findings of Fact and Conclusions of Law by the plaintiff were filed in Case No. SA CV 92-221-AHS (RWRx) on April 3, 1996. Findings of Fact and Conclusions of Law

by the Respondent were filed in Case No. SA CV 93-354-AHS (RWRx) on April 3, 1996.

Judgment in SACV 92-221-AHS (RWRx) was filed on April 3, 1996 in the amount of $1,286,580.00.

Judgment in SACV 3-354-AHS (RWRx), adjudicating the judgment in Case No. SACV 92-221-AHS (RWRx) to be a non-dischargeable debt under 11 U.S.C. §523(a)(6), was filed on April 3, 1996.

Dr. Luem lodged another Substitution of Attorney on both cases following trial, on November 22, 1996. The District Court made a point of not approving these subsequent Substitutions until judgment was filed on April 3, 1996.

A notice of appeal was filed in SACV92-221-AHS (RWRX) on April 19, 1996.

A notice of appeal was filed in SACV93-354-AHS (RWRx) on April 19, 1996 also.

Both of these appeals were ordered consolidated by the Ninth Circuit Court of Appeals on June 3, 1996.

A memorandum of decision was filed on August 7, 1997 in the Ninth Circuit Court of Appeals, nos. 96-55597, 96-55601, affirming the judgment of the District Court.

The Ninth Circuit specifically held that the District Court's refusal to substitute counsel violated no rights of the respondent, quoting case authority for the proposition that there is generally no right to counsel in civil cases.

Petitioner filed a Petition for Rehearing on August 20, 1997, the sole contention of which was that while there is no constitutional right to court-appointed counsel in civil cases, that there is a constitutional right to privately-retained counsel in civil cases that has been recognized by the U.S. Supreme Court.

The Petition for Rehearing was denied on October 22, 1997.

REASON FOR GRANTING THE WRIT

Petitioner does not dispute the fact that there is no constitutional right to court-appointed counsel in a civil case.

Petitioner does contend that he had an absolute right to retain private counsel at his own expense, so long as the trial was not delayed. This was a constitutional right guaranteed him under the due process clause of the Fifth Amendment, and he was effectively denied a hearing when the District Court denied the Motion to Substitute in an attorney.

Once the Petitioner's request for a continuance was withdrawn by Petitioner's chosen counsel, the District Court had no discretion to deny the Motion to Substitute Attorney under either the Local Rules or the Fifth Amendment.

Petitioner is now burdened with a non-dischargeable judgment in the amount of $1,286,580.00.

The Ninth Circuit Court of Appeals upheld the District Court's denial of Petitioner's Fifth Amendment rights, in contravention of the Supreme Court's prior holding in *Powell vs. State of Alabama* (1932) 287 U.S. 45, 69; 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

CONCLUSION

Petitioner had an absolute right to retain private counsel at his own expense, so long as the trial was not delayed. This was a constitutional right guaranteed him under the Fifth Amendment, and he was effectively denied a hearing when the District Court denied the Motion to Substitute Attorney.

DATED: November 26, 1997.

Respectfully submitted,

BURGE, STRID AND DICKINSON

LAWRENCE A. STRID
Counsel of Record for Petitioner

"NOT FOR PUBLICATION"
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CARL R. LUEM, and
CAROL LUEM,
Debtors.

Nos. 96-55597
96-55601

PATRICIA A. BILLETTER,
Plaintiff-Appellee,
v.
CARL R. LUEM, M.D.,
Defendant-Appellant.

D.C. Nos.CV-92-00221-AHS
CV-93-00354-AHS
MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding
Submitted August 4, 1997**
Pasadena, California
Filed August 7, 1997

Before: HALL and T.G. NELSON, Circuit Judges, and
WINMILL, *** District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

*** Hon. B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

Dr. Carl R. Luem appeals from (1) an order denying summary judgment and (2) the district court's judgment in favor of Patricia A. Billetter following a court trial. Billetter brought this action claiming, *inter alia*, battery by way of unrequested and unnecessary surgery. Luem unsuccessfully moved for summary judgment on the grounds that the one-year statute of limitations for battery had expired as to two of the three surgeries performed. On the day trial was scheduled to begin, the district court refused Luem's request to substitute counsel for pro se representation. In the absence of Luem, the bench trial was conducted and Billetter prevailed. We affirm both the denial of summary judgment and the district court's entry of judgment.

I.

Under California law, an action for battery must be brought within one year. Cal. Civ. Proc. Code § 340(3) (West 1996). That limitations period may be tolled, however, during the physician/patient relationship when the patient is unaware that the surgery was unnecessary. *Hundley v. Saint Francis Hosp.*, 327 P.2d 131, 135 (Cal. Dist. Ct. App. 1958). When the question turns on what reasonable person should know, a mixed question of law and fact is presented that is reviewed for clear error. *Rose v. United States*, 905 P.2d 1257, 1259 (9th Cir. 1990).

Despite Luem's protests to the contrary, *Hundley* directly controls this case. In *Hundley*, as in this case, the patient was aware of the extent of the surgery shortly after it was conducted. *Hundley*, 327 P.2d at 135. In *Hundley*, there was testimony that the doctor told the patient that the surgery was necessary because of "a pathology that he found there." *Id.* In this case, Billetter testified that Luem told her that he removed "fibrocystic tissue" during the first surgery. In

neither case, however, was there any evidence of the existence of such offensive tissue. *See id.* In *Hundley*, as in this case, the plaintiff's complaint for battery is dated within one year of her discovery, that the surgery was performed unnecessarily. *Id.* We hold, therefore, that the district court's refusal of summary judgment was appropriate.

II.

We also hold that the district court did not abuse its discretion or deny Luem's constitutional rights by denying Luem's motion to substitute an attorney to represent him at trial. The Local Rules of the Central District of California provide: "Unless good cause is shown and the ends of justice require, no substitution or relief of attorney will be approved that will cause delay in prosecution of the case to completion." C.D. Cal. Civ. R. 2.8.2.4. The district court's compliance with local rules is reviewed for an abuse of discretion. *Hinton v. NMI Pac. Enters.*, 5 F.3d 391, 394 (9th Cir. 1993).

The district court's finding that the substitution of counsel would create delay without good cause was not an abuse of discretion. Even though Luem's new counsel waived any request for a continuance, Luem himself was in Georgia conducting surgery on the first day of trial. Billetter's counsel intended to call Luem as his first witness for the scheduled start of trial that day. He did not subpoena Luem because he expected him to be present to act as his own attorney. *See* C.D. Cal. Civ. R. 2.9.2 ("Any person representing himself or herself without an attorney must appear personally for such purpose."); *id.* 2.8.2.1 ("An application for leave to withdraw [as counsel] must be made upon written notice given reasonably in advance to the client and to all other parties who have appeared in the action.").

Trial would have been delayed, therefore, if the district court allowed substitution of counsel. Considering the long standing trial date and Luem's failure to keep up with communications with the court, the district court did not abuse its discretion by failing to find good cause.

Nor does the district court's refusal to substitute counsel violate any rights held by Luem. "[I]t is well-established that there is generally no constitutional right to counsel in civil cases." *United States v. Sardone*, 94 F.3d 1233, 1236 (9th Cir. 1996); *see also Hernandez v. Whiting*, 881 F.2d 768, 770-71 (9th Cir. 1989) ("A prisoner ... cannot demand to be present at any stage in the development of his civil case and has no claim, barring special circumstances, to have counsel assigned to be present for him."). Luem does not possess any constitutional rights that would permit him to substitute attorneys at will.

The district court is AFFIRMED.

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/5/96

/s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ENTERED
Clerk, U.S. District Court
Apr 5, 1996
Central District of California
By Santa Ana Deputy

FILED
Clerk, U.S. District Court
April 3, 1996
Central District of California
By Santa Ana Deputy

PATRICIA A. BILLETER
Plaintiffs,

v.

CARL LUEM, M.D. et al.,
Defendant.

SA CV 92-221-AHS(EEx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AFTER COURT TRIAL

I.
PROCEDURAL HISTORY

On March 6, 1995, notice was given that this matter was scheduled for jury trial to commence November 7, 1995. Thereafter, but before the time of trial, it came to the court's attention that notices sent by the Clerk's office to defendant went unanswered. On October 16, 1995, an Order to Show Cause, returnable one week later, was directed to defendant for his failure to keep the court advised of his current telephone number and address so that he could receive necessary communications from the court. No response was received.

When trial was called on November 7, 1995, the defendant did not appear. Defendant had submitted no jury instructions or proposed voir dire. Plaintiff represented that defendant was an essential witness and was intended by plaintiff to be called as the first witness at trial. The day before trial was scheduled to begin, Attorney Lawrence A. Strid had attempted to file an "Ex Parte Application for Order Allowing Substitution of Attorney and Continuance of Trial." Part of this application, filed in the form of a declaration under penalty of perjury by counsel, stated that defendant's file "fills two banker boxes" and that the declarant, Mr. Strid, "will not be sufficiently familiar with the file to conduct trial by November 7, 1995." This assertion was followed by a request to continue the trail date "to a date at least 120 days away."

Attorney Strid attempted to appear on behalf of defendant on the morning of trial, representing that it was his information that defendant was in surgery but ready to fly to California from Georgia for trial. Mr. Strid said he would be ready to try the case.

The Court found that defendant's immediate presence was necessary and ruled that delaying the trial to obtain his presence was not justified in light of the long-standing trial date, the defendant's failure to respond to the Court's Order to Show Cause, and the court's schedule for other matters. The Court therefore denied counsel's request to appear and substitute in for defendant.

Trial to the Court was held November 7, 1995. At the close of plaintiff's evidence the Court ruled on the issues presented by the Pretrial Order. Plaintiff's counsel was directed to prepare, serve, and lodge proposed Findings of Fact and Conclusion of Law.

Upon further review of the evidence and law, the

Court enters the following findings of fact and conclusions of law in support of judgment for plaintiff pursuant to F. R. Civ. P. Rule 52 and Local Rule 14.3.

II.
FINDINGS OF FACT

1. Plaintiff suffered from breast asymmetry, her right breast being of a size almost double that of her left breast. Her physical distortion was sufficiently great that she wore a prosthesis to create an even appearance about her upper torso. Exhibits 3, 4, and 5 depict plaintiff's pre-operative condition.

2. Plaintiff consulted with Dr. Carl R. Luem, originally as her obstretician-gynecologist. She felt comfortable with him, and he learned from her how much her breast asymmetry troubled her.

3. Plaintiff was operated on three times by defendant Luem: 10/27/89; 12/18/89; and 5/21/90.

4. Defendant represented to plaintiff that performing a reduction and augmentation was "not a big deal." Defendant did not inform plaintiff that he would remove tissue from the left (the smaller) breast. At no time was plaintiff informed that excessive amounts of tissue would be extracted from the right breast so that an implant would have to be inserted. Had plaintiff been so informed, she would not have agreed to surgery.

5. Although defendant's medical records as produced during litigation show an extended discussion of the risks of surgery (see Exhibit 6-5), plaintiff's Exhibit 19-1, a copy of one page of plaintiff's medical records obtained by her in 1990 or 1991 (before defendant was given notice of suit), reveals no such discussion of the risks of mammoplasty.

6. Exhibit 6-43, signed by plaintiff on 10/23/89, shows that she signed a form discussing "Augmentation Mammoplasty." The word "reduction" was added on by defendant after the surgery. The same is true for Exhibit 6-46. Comparison with exhibits 17 and 18 shows the original condition of the "consents."

7. Defendant admitted that he altered plaintiff's medical records. *See* and *compare* Exhibits 19-1 through 19-9 with Exhibits 6-5 through 6-8, 6-21, 6-22, 6-42, 6-43, and 6-45.

8. Defendant tried to cover up in the medical charts the grievous injuries that he inflicted on plaintiff by disguising the nature of the "informed consents" that she signed and the information that he purportedly provided. There is no evidence of consent for the third surgery.

9. After the first surgery, plaintiff learned that she had implants in both breasts, although the consent form does not disclose that any implant was to be placed in plaintiff's right breast, the larger breast. In addition, too much tissue had been removed from the right breast so that it was now smaller than the left breast.

10. Plaintiff's left breast appeared to be the same size as before the surgery. The post-operative report for the first surgery indicates that healthy tissue was also removed from the left breast (the breast to be augmented). An implant was inserted in this breast.

11. Plaintiff suffered from infections thereafter and lost her entire right nipple; a small amount of areola remained on the left. The darker area now visible is mainly a scar.

12. Plaintiff's second operation resulted in a smaller implant being inserted in the left breast. Exhibit 78 shows that plaintiff consented to an operation concerning a "wound closure." Defendant showed plaintiff albums of

photos representing to plaintiff that he had previously performed such surgeries and that his past surgeries were successes.

13. Plaintiff's left breast began to "crust" and develop depressions, ultimately exposing the implant. Numerous efforts in defendant's office, such as cutting away dead tissue, suturing, and other steps did not result in the left breast's healing.

14. Plaintiff's third surgery in May 21, 1990, resulted in the larger implant being removed from plaintiff's right breast and a smaller implant being inserted.

15. Exhibits 8, 9, and 14-1 through 14-9 shows plaintiff's scars, indentations, loss of nipples, and plaintiff's generally deformed post-operative breast condition. The disfigurement resulted in numbness of the entire front of both breasts.

16. Since April of 1991, plaintiff has been disabled from her regular occupation, that of wallpaper applicator and painter for interior decorating, because the tissue has tightened all around plaintiff's chest. The implants have also hardened, contributing to the tightening of plaintiff's upper torso. The scarring from the surgeries has also hardened. Plaintiff is unable to raise her arms over her head and has no mobility or strength to perform the interior decorating work.

17. Plaintiff suffers pain when she tries to lift things or raise her arms higher than her head. Plaintiff is permanently prevented from breast-feeding a baby because she has no nipples.

18. Plaintiff has had to accept to a lesser paying administrative job, earning at time of trial approximately $19,000.00 per year. She will have to stay in this position until retirement in her 60's, since it does not appear that reconstructive surgery can restore plaintiff's mobility or

strength (even if her appearance can be restored).

19. Plaintiff previously had a **net** income that averaged $44,482 for the years 1984 through 1988 (the year before plaintiff's first surgery). See Exhibit 35.

20. Plaintiff's current average gross earnings, averaging the years 1990 through 1994, are $17,213. See Exh. 33.

21. Plaintiff's past medical expenses to date of trial were $14,517.

22. Defendant Carl Luem, M.D. performed surgeries that were substantially different from the operations to which plaintiff consented. Defendant committed two medical batteries on plaintiff's left breast which occurred during the first and second surgeries, and two medical batteries on plaintiff's right breast which occurred during the first and third surgeries.

23. Defendant Carl Luem's conduct during the surgeries performed on plaintiff were an intentional deviation from any consents given by her. *See* Decl. Of Robert T. Miner, M.D. filed Feb. 15, 1994, at 8, ¶ 24.

24. Any signed consent form or verbal consent given by plaintiff regarding the subsequent surgeries was vitiated by the conduct and communication by defendant Carl Luem, M.D., to plaintiff regarding her first surgery. Plaintiff did not consent to the surgeries and treatment as ultimately provided by defendant Carl Luem, M.D.

25. Any and all consent given by plaintiff for the surgeries was conditional. Defendant proceeded without observing the conditions placed on plaintiff's consent.

26. The acts of defendant Carl Luem, M.D., proximately caused damages to plaintiff as follows:

a. $604,563.00 for loss of earnings, $127,200 in loss earnings from 1991 through 1994; and $477,363

in lost future earnings;

b. $82,017.00 for past and future medical bills, $14,517.00 for past medical bills (Exh. 21-22, 25, 26, 31); $50,000 for future reconstructive surgery, according to Dr. Miner; $10,000 for future hospitalization; and $7,500 for future psychiatric counseling;

c. $500,000.00 in general damages.

27. Clear and convincing evidence as required by California Civil Code section 3294(a) has been adduced to show that defendant Carl Luem, M.D., is guilty of oppression, fraud and malice and should be punished with punitive damages. Although there is limited evidence of defendant's worth, there is evidence that defendant currently practices surgery as an obstetrician-gynecologist. The sum of $100,000 is sufficient to achieve the punitive purposes of exemplary damages, given the award of compensatory damages and other circumstances.

28. Plaintiff did not contribute to her damages.

CONCLUSION OF LAW

1. Defendant Carl Luem's conduct constituted a medical battery on plaintiff.

2. Plaintiff did not consent as a matter of law to the treatment provided by Defendant Carl Luem, M.D.

3. Plaintiff is entitled to recovery compensatory and punitive damages.

4. Plaintiff is entitled to judgment in the amount of $1,286,580.00.

IT IS SO ORDERED.

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/ 5/96

/s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ENTERED
Clerk, U.S. District Court
APR 5, 1996
Central District of California
By Santa Ana Deputy

FILED
Clerk, U.S. District Court
APR 3, 1996
Central District of California
By Santa Ana Deputy

PATRICIA A. BILLETER
Plaintiffs,

v.

CARL LUEM, M.D. et al.,
Defendant.

SA CV 92-221-AHS(EEx)

JUDGMENT

This action came on for trial on November 7, 1995 before the Court, the Honorable Alicemarie H. Stotler, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiff Patricia A. Billetter recover from defendant Carl Leum, M.D. the sum of $604,563.00 in economic damages for past and future loss of earnings, $82,017.00 in economic damages for past and future medical bills, $500,000.00 in general damages, and $100,000.00 in punitive damages, for a total judgment of $1,286,580.00, with

interest as provided by law and her costs of action.

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/ 5/96

/s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
Clerk, U.S. District Court
APR 5. 1006
Central District of California
By Santa Ana Deputy

FILED
Clerk, U.S. District Court
APR 3, 1996
Central District of California
By Santa Ana Deputy

PATRICIA A. BILLETER
Plaintiffs,

v.

CARL LUEM, M.D. et al.,
Defendant.

SA CV 93-354-AHS(EEx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER COURT TRIAL

Following trial proceedings in Case SA CV 92-221 AHS, Findings of Fact and Conclusions of Law were duly made and entered. Incorporating by reference the foregoing Findings and Conclusions, and pursuant to Rule 52, F.R. Civ. P. and Local Rule 14.3, the Court now makes these additional Findings of Fact:

1. Defendant Carl Luem committed a wrongful and intentional act during the October 27, 1989 surgery, the December 18, 1989 surgery, and the May 21, 1990 surgery.

2. The conduct of Defendant Carl Luem, in performing the above referenced surgeries, was certain to cause harm.

3. Defendant Carl Luem exercised a conscious disregard of his duties without just cause or excuse and in a manner that he should have known presented a risk of harm during the performance of these surgeries.

4. Defendant Carl Luem engaged in a willingness to risk plaintiff's loss for the prospect of personal benefit for himself.

5. The conduct of Defendant Carl Luem was in complete and total disregard for acceptable medical practice.

6. Harm was substantially certain to occur to plaintiff based on all inferences reasonably available from the nature of the acts committed by Defendant Carl Luem.

7. The conduct of Defendant Carl Luem actually produced harm and injuries to plaintiff resulting in damages to her.

8. The conduct of Defendant Carl Luem was without just cause or excuse.

9. Plaintiff did not consent to the surgeries and treatment provided by Defendant Carl Luem, M.D.

10. Plaintiff did not contribute to her damage.

The Court makes the following Conclusions of Law:

1. Plaintiff's claim for damages arising from medical procedures performed by Defendant Carl Luem is a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(6).

2. Plaintiff did not consent as a matter of law to the treatment provided by Defendant Carl Luem, M.D. *In re Paul K. Berman* (S.D. Fla. 1993) 154 B. R. 991, 1003.

IT IS SO ORDERED.

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/5/96

/s/

DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ENTERED
Clerk, U.S. District Court
APR 5, 1996
Central District of California
By Santa Ana Deputy

FILED
Clerk, U.S. District Court
APR 3, 1996
Central District of California
By Santa Ana Deputy

PATRICIA A. BILLETER
Plaintiffs,

v.

CARL LUEM, M.D. et al.,
Defendant.

SA CV 93-354-AHS(EEx)

JUDGMENT

This action came on for trial on November 7, 1995 before the Court, the Honorable Alicemarie H. Stotler, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

that the Judgement of plaintiff Patricia A. Billetter in District Court case No. SACV 92-221-AHS (EEx) is a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(6).

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/5/96

/s/

DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 22 1997
Cathy A. Catterson, Clerk
US. COURT OF APPEALS

In re: CARL R. LUEM, &
CAROL LUEM
Debtors.

PATRICIA A. BILLETTER,
Plaintiff/Appellee,

vs.

CARL R. LUEM, M.D.,
Defendant/Appellant.

Nos. 96-55597
96-55601

D.C. No. CV-92-00221-AHS
CV-93-00354-AHS

ORDER

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL, * District Judge.

Having been reviewed by the Court, the petition for rehearing is DENIED.

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* Hon. B. Lynn Winmill, United States District judge for the District of Idaho, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN - 3 1996
Cathy A. Catterson, Clerk
US. COURT OF APPEALS

In re: CARL R. LUEM, et al.,
Debtors.

PATRICIA A. BILLETTER,
Plaintiff/Appellee,

vs.

CARL R. LUEM, M.D.,
Defendant/Appellant.

Nos. 96-55597
96-55601

DC# CV-92-00221-AHS
Central California
(Santa Ana)

ORDER

The joint motion to consolidate is granted. The above-captioned appeals are ordered consolidated. The briefing schedule set in Appeal No. 96-55597 shall govern the appeals.

The appellant is reminded that a certificate of record must be filed in each appeal.

For the Court:
CATHY A. CATTERSON
Clerk of the Court
/s/ Lou Pearson
Lou Pearson Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of Appeals

pro5.27

EXCERPTS OF REPORTER'S TRANSCRIPT OF PROCEEDINGS [Pages 377 through 388]

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SANTA ANA, CALIFORNIA;
TUESDAY, NOVEMBER 7, 1995 10:00 A.M.

THE CLERK: Item number 1, SA CV 92-221-AHS (EEx), Patricia A. Billetter vs. Carl R. Luem, M.D., et al.; and Item number 2, SA CV 93-354-AHS (EEx), Patricia A. Billetter vs. Carl R. Luem, M.D., et al.

Counsel, please make your appearance.

MR. MAHAFFEY: Yes. Good morning.

Douglas Mahaffey representing the plaintiff Patricia Billetter.

MR. STRID: Good morning, your Honor.

Lawrence Strid on behalf of the defendant Carl Luem, M.D. I'm not technically substituted in yet. I did submit an ex parte application to that effect on both of the cases Friday.

THE COURT: Is the defendant present?

MR. STRID: No, he is not, your Honor. But I have him on standby ready to fly out. He resides in Georgia and he is in surgery this morning.

THE COURT: The matter is set for commencement of jury trial, today is the first day. The substitution has not been approved in light of the fact that the defendant appeared to be seeking a postponement of these proceedings and the delay to be occasioned would obviously retard commencement of proceedings here.

The plaintiff, as I understand it, had made a jury demand. However, according to the docket and the Court's file, the plaintiff has not perfected presentation of jury instructions. So it is not clear to me that that is how she intends to proceed.

Lastly, the clerk advises that the parties have been talking settlement, although it is apparent the matter has not been resolved.

I should like to know what plaintiff wishes in that regard.

MR. MAHAFFEY: Thank you, your Honor.

In regards to the Court's comments on plaintiff's demand for jury, plaintiff still maintains that demand. The pretrial order had ordered that defendants prepare the first set of jury instructions, prepare those and send those to plaintiff. We were then to correct them, submit them back, and then follow the Local Rule as to any areas that were objected to.

I wrote Dr. Luem approximately eight weeks ago and advised him that we had that obligation when he was in pro per and did not have a telephone. I have had in my possession since 1994, which I believe the Court may even have in the file, the plaintiff's jury instructions which I had served on his predecessor counsel. I waited him to respond and then spoke directly to Mr. Pierson about whether we needed to do something last week, and I, apparently not focusing carefully on the jury instructions, overlooked the fact that perhaps I should unilaterally submit my set.

I would represent that they are the same set that I gave to defense counsel about a year ago.

THE COURT: We show nothing ever filed with the Court. You are indicating that this was merely given to defense counsel at the time.

MR. MAHAFFEY: That's correct.

I don't see a file stamp on my set either, which I'm not sure I quite understand because it is blue-backed and it was with my other documents. It's a mystery why I didn't file it. But that was my oversight. And because there is a demand for jury, I believe that this may be something we

could remedy by filing this morning perhaps. That would be the request of the plaintiff.

Otherwise, we are prepared to proceed. There has not been an acceptance of the settlement offer that has been proposed at this time.

THE COURT: Let me indicate that the Court is actually entitled to not call in or otherwise discharge -- is entitled to discharge a jury panel that has been brought in where the parties have not perfected their jury instructions as ordered by the Local Rules in addition to the pretrial order in this particular case.

I am also concerned that the defendant is not here. And in light of the plaintiff's representation that she is prepared to go forward, I'm inclined to think that the matter should go forward without the assistance of proposed counsel, Mr. Strid, helpful though that would be, in light of the fact that I'm not disposed to postpone the matter. With regard to the jury, I'm willing to defer.

As a friend of the Court, Mr. Strid, is there any enlightenment that you can cast on this with regard to the status of defendant Luem?

MR. STRID: Well, your Honor, my client did admittedly wait to the eleventh hour to retain me. I was not technically retained until Friday, and I spent the entire weekend studying the file. Dr. Luem does want counsel in this matter. And if the Court would be willing to allow myself to be substituted in, I would have the authority to waive any request for a continuance of the trial on his behalf.

THE COURT: I am concerned about taking that representation from you only because we have received the ex parte application that was filed on November the 6th. I take it that there was no proof of service on the original, so it was returned, but we received it yesterday. And in light of the

request of the time needed, are you representing to the Court that you have full authority to try the case, to settle it if if becomes appropriate, and withdraw the request for continuance?

MR. STRID: Yes, I am, your Honor.

THE COURT: Let me move back then to -- well, let me inquire of defendant if it is his anticipation that a jury decide this matter.

MR. STRID: The defendant is not requesting a jury trial, your Honor.

THE COURT: Without ruling on the substitution yet, let me find out from plaintiff if this representation through proposed counsel is sufficient for plaintiff's purposes, given the history of the case.

MR. MAHAFFEY: Well, with due respect to my colleague at the bar, I understand his predicament. However, we have not received cooperation from defendant Luem. He is not present. This matter has been trailing, I believe, for a year based on a prior trial setting. The case was a '89 surgery, with the events being transpired in late '89, and the case was filed in superior court in 1991, I believe.

It's difficult for me to have a lot of sympathy for Dr. Luem who has had six months of notice of this trial since he has been in pro per. And I believe that to accept the substitution, allow an attorney to proceed -- one of my witnesses is Dr. Luem, and that defeats the strategy that I had, which was to call him first. And I'm not able to do that, to place in front of the jury what I believe is the most crucial evidence at the beginning of my case. I would object respectfully.

In light of counsel's efforts, I respect those, but this is a very serious matter and we are prepared to proceed. And there is no defendant here, there is no substitution on file.

There was a request for continuance made to me personally, as well as a notice served on me that was being made. You know, I would object and stand on our rights to proceed with no defendant present, and the Court can decide whether a jury needs to be impaneled or not.

Perhaps with the facts as they are, we may just waive jury and proceed right now with the Court, which we could simply do, and end this trial.

THE COURT: I must note that earlier in October, we issued an order to show cause to the defendant because we apparently did not have a correct telephone number where this litigant could be reached. And that was due to be returned to the Court on October the 23rd, and we have never received a response from defendant with regard to how he can be contacted concerning this case.

I'm not inclined to allow counsel to substitute in and, as plaintiff's counsel has suggested, due sympathy should be accorded to Mr. Strid who has attempted to come in at the eleventh hour to represent defendant in this case. I, too, am rather surprised, in fact quite surprised, that Dr. Luem is not present to defend himself in this case. And that was without consideration to any strategical decisions that the plaintiff may have had in mind with regard to calling him first.

If the Court is not persuaded otherwise, then I will deny the application to allow counsel to substitute in and have that matter go forward without the defendant. And the reason for that is simply that the case has been set for approximately one year and the defendant has been on notice of that. I do not wish to put Mr. Strid in a difficult position, but I think it is the situation that defendant Luem himself has created.

I would like to think about this for just a moment in light of your information. And, Mr. Strid, I will accord you an opportunity to comment further, but these are certainly my

inclinations at this point.

MR. STRID: Well, I appreciate your Honor's comments and I'm also familiar with the old saying that justice delayed is justice denied. But I think that justice rushed without giving a litigant an opportunity to be represented is also justice denied.

It is my understanding in reviewing the file that this case, when set for trial originally, was continued not at the behest of Dr. Luem, but at the behest of plaintiff's counsel who had some calendar problem in another courtroom and wanted the matter continued. And while some of this delay and this case going on so long may be attributable to Dr. Luem, I don't believe it should be allowed to rest entirely at his feet.

I would also point out to the Court that he is an obstetrician/gynecologist, he is running a rural practice back in Georgia, he has had surgery set for some time, including a hysterectomy which he is performing this morning. He has expectant mothers that he has to take care of, and he just -- he has to make arrangements for other physicians to do this. And he couldn't get out of the surgery.

And the man has represented to me, and I believe that, for what it's worth, that he is prepared to fly down here and participate in this trial. But without being given counsel, I do believe that would be in effect a moot exercise, your Honor. It would be extremely prejudicial and unfair to the defendant.

THE COURT: I will give it some consideration. I do have a jury panel on hold for this case, and we will have to decide how to proceed promptly in that I may need to release that panel to another judge for use today.

I see a defendant who has been on notice for a year about the trial date. So, given the information that he has a practice to run elsewhere is understandable, but really it does

not excuse a failure to appear on the date of trial. I will take a very brief recess to consider this further.

My inclination is to simply have the matter go forward. I guess I should inquire of plaintiff if, notwithstanding the absence of the first intended witness, Dr. Luem, the plaintiff is otherwise prepared to go forward.

MR. MAHAFFEY: Yes, we are, your Honor.

THE COURT: We stand in recess.

(Recess.)

THE COURT: The record will show the presence of counsel as before.

On due consideration, it appears to the Court that the matter should proceed to trial before the Court and proceed forthwith, the Court denying the substitution of counsel and denying what was filed a request for postponement.

The defendant being in pro per has not appeared and, depending on the course of the plaintiff's case, may have an opportunity to defend in light of the following: I intend to start the case, and if the matter is concluded today, the Court will decide the matter based upon the plaintiff's evidence. If it is not completed, the case will resume not tomorrow, but the following Tuesday, which would be November the 14th, at 8 o'clock in the morning. If the defendant elects to appear, he can then resume in the case or he may affirm to the Court all representations by counsel.

As noted, if we conclude the case today, the Court will decide the issues as framed in the pretrial order in both of these matters. If counsel have any additional suggestions with regard to how the matter should proceed, I will hear from plaintiff's counsel.

MR. MAHAFFEY: Nothing further, your Honor.

THE COURT: Is that agreeable with you, sir?

MR. MAHAFFEY: Yes, it is.

THE COURT: All right.

And by way of preserving defendant's objection through intended counsel, let us deem previous remarks of Mr. Strid offered to the Court at this time so that the defendant's position in the record is clear.

Is there anything further that you wish to note on his behalf, notwithstanding your nonappearance, Mr. Strid?

MR. STRID: If I may, your Honor.

Again, your Honor, with all due respect to the Court's ruling, and I hate to sound like a broken record on this, I think a tremendous injustice is being done Dr. Luem in this matter. I have offered to withdraw the request for a continuance if I can substitute in. I believe that there is very strong evidence which militates against the type of case that the plaintiff is bringing against the defendant.

And the plaintiff -- I don't expect to proffer that up, that evidence up, if she is allowed to proceed basically in a default mode, which means in all likelihood she is going to get a judgment, it's not going to be dischargeable and it's probably going to be for a large amount that my client is going to be visited with. And all he wants is an opportunity to present his side of the case through an attorney, and I don't think that that would stop this matter from going forward right now.

And that's all I wanted to say on the record. Thank you.

THE COURT: The defendant has in essence defaulted, as counsel notes, by not appearing on the date set for trial that was known approximately one year ago. And the concerns that we have had with regard to his responding to the Court's contacts that have been previously noted, the matter will proceed as noted.

Counsel for defendant who has offered to appear is not allowed to appear. The Court, of course, will permit counsel to remain in the courtroom, albeit not at defense counsel's seat, and the plaintiff can tell us the intended progress of her case.

I previously had looked at the witness list here, and inasmuch as defendant is not present, it does not appear, unless the plaintiff selects to wait until next Tuesday, which time can be set aside for conclusion or her case, to call the defendant, assuming he ever decides to come to Court. Otherwise, that witnesses, but let me double-check. Seventeen witnesses.

One last administrative item. I am going to direct the clerk to notify the clerk's office that the jury panel for this matter may be made available to other judges of the court that may need their services.

MR. STRID: In light of that ruling, your Honor, may I be excused?

THE COURT: You may be excused, if you so choose, of course. We will make note of any time that you appear or leave the courtroom, Mr. Strid.

And I will call upon plaintiff's counsel to issue opening statement at this time.

MR. MAHAFFEY: Thank you, your Honor.

The case in front of the Court, if the Court recalls, actually arose from both a civil action that was originally a malpractice batter action that became allegedly a nondischargeable claim by defendants' filing of

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